84-1134

No.

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
October Term, 1984

GOLDMAR, LTD., INC., *et al.*,
Petitioners,

v.

GEORGE GREELEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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January 14, 1985

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QUESTIONS PRESENTED

Whether mere investigation by a government agent is sufficient to put the criminal train *in esse* so as to make an order denying a Rule 41(e) motion interlocutory and thus nonappealable.

PARTIES TO THE PROCEEDING

GOLDMAR, LTD., INC.
3741 West Broward Boulevard
Suite 201
Fort Lauderdale, Florida
Petitioner,

PANGOLD, LTD., INC.
3741 West Broward Boulevard
Suite 201
Fort Lauderdale, Florida
Petitioner,

George Greeley
Special Agent
INTERNAL REVENUE SERVICE
299 East Broward Boulevard
Room 309-D
Fort Lauderdale, Florida
Respondent,

and

JAMES J. MICHALAK
Special Agent
INTERNAL REVENUE SERVICE
299 East Broward Boulevard
Room 309-D
Fort Lauderdale, Florida
Respondent.

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IN THE

Supreme Court of the United States

October Term, 1984

No. _____

GOLDMAR, LTD., INC., *et al.*,
Petitioners,

v.

GEORGE GREELEY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

GOLDMAR, LTD., INC. and PANGOLD, LTD., INC. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinions of the Eleventh Circuit Court of Appeals dismissing the case for lack of jurisdiction (App. A., *infra,* 1a) and denying the Petition for a Rehearing (App. A.,

infra, 2a) are not reported. The opinions of the District Court denying petitioners' Motion for the Return of Seized Property and the Suppression of Evidence and Other Relief (App. B, *infra,* 1b) and granting, in part, petitioners' Motion for Reconsideration (App. B, *infra,* 3b) are not reported.

JURISDICTION

The dismissal of petitioners' appeal by the Eleventh Circuit on the grounds that it was without jurisdiction to review the judgment of the District Court was entered on September 26, 1984. The Eleventh Circuit's denial of petitioners' Motion for Reconsideration was entered on November 14, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment of the Constitution of the United States provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

28 USC §1291 provides in part, that

The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts * * * except where a direct review may be had in the Supreme Court.

Fed. R. Crim. Proc., Rule 41(e), provides:

(e) *Motion for Return of Property.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

STATEMENT

Shortly after 10:15 a.m. on the morning of September 14, 1983, Internal Revenue Service Special Agents George Greeley and James J. Michalak (respondents) arrived unannounced at the offices of Goldmar, Ltd., Inc. and Pangold, Ltd., Inc. (petitioners) located at Suite 201, 3741 West Broward Boulevard, Fort Lauderdale, Florida and searched and seized petitioners' records, carting them off in numerous boxes. The records included petitioners' confidential books and records including privileged attorney-client files as well as other privileged materials. The said search took place incident to a search warrant issued by United States Magistrate Patricia Jean Kyle in Case No. 83-4263-PJK. The search warrant was based upon the affidavit of Special Agent Greeley and was placed under seal pursuant to the Government's Motion to Seal.

At approximately 5 p.m. the same day, the Government sought and received yet a second warrant from Magistrate

Kyle (Case No. 83-4264-PJK). The reason for the delay in issuance of the second warrant is explained by the fact that it was not sought until after respondents completed their first seizure which took almost all day to perform. The second warrant was based on the affidavit of Special Agent Michalak which, pursuant to Government motion, was also placed under seal.

The second search was allegedly premised on what the respondents saw on their first search. At the time of the second search, the respondents seized the balance of petitioners' business records.

On September 26, 1983, petitioners filed a Motion for the Return of Seized Property and the Suppression of Evidence and Other Relief, pursuant to Fed. R. Crim. Proc., Rule 41(e), in the United States District Court for the Southern District of Florida. Petitioners claimed that their property had been illegally seized and that they were therefore entitled to reclaim lawful possession of the property, together with all copies, extracts, and any other evidence obtained from the documents. Even though there was no criminal proceeding *in esse* at the time petitioners filed their motion (nor has there been at any time thereafter) petitioners sought as additional relief automatically available under Rule 41(e), that the documents be suppressed as evidence in any future criminal proceeding, if any, and that the court issue an order authorizing petitioners to review and make copies of the sealed affidavit of George Greeley. (At the time petitioners filed their motion, they did not know that the second warrant was based on the affidavit of Special Agent Michalak).

On September 27, 1983, U.S. District Judge James C. Paine denied all requested relief. Thereafter, on September 30, 1983, petitioners filed a Petition for the Return of

Seized Property and Other Relief and a Motion for Reconsideration of Order Denying Relief.

On November 18, 1983, more than two months after the searches, Judge Paine held a hearing on the Motion for Reconsideration. On December 7, 1983, Judge Paine (1) ordered the return of the documents seized, excepting originals determined by respondents as being subject to examination for authentication (which documents have never been returned to this date), (2) ordered that copies of the documents retained by respondents be provided to the petitioners, (3) denied petitioners' request to unseal the alleged affidavit of Special Agent Greeley upon which the first search warrant was issued, (4) denied without prejudice petitioners' motion to suppress, and (5) ordered that the above directives be carried out by respondents within ten (10) days.

On January 19, 1984, the petitioners timely filed an appeal of Judge Paine's December 7, 1983 Order with the United States Court of Appeals for the Eleventh Circuit.

At no time prior to or since the issuance of the subject search warrants have the petitioners been subject to arrest, detention or presentation to a United States Commissioner, nor has there been an empaneling of a grand jury, complaint, release on bail following arrest, arraignment, information, or indictment. However, on brief in the Circuit Court, respondent argued that said Court was without jurisdiction to review the District Court's order because (1) the petitioners' motion was primarily one of suppression, and (2) mere investigation of the petitioners put the criminal train *in esse* and thus renders the district court's order interlocutory. Petitioners maintain that this Court's previous decisions and the view of the majority of circuits mandate a different result.

On September 26, 1984, by unpublished Order, Circuit Judges Hatchett and Clark and District Judge Stafford (sitting by designation) dismissed the appeal for lack of jurisdiction. On October 15, 1984, petitioners filed Appellants' Suggestion of En Banc Consideration Upon Rehearing. However, on November 14, 1984, petitioners' petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I. THIS HONORABLE COURT HAS LONG HELD THAT MERE INVESTIGATION BY A GOVERNMENT AGENT IS NOT SUFFICIENT TO PUT THE CRIMINAL TRAIN IN ESSE SO AS TO MAKE AN ORDER DENYING A RULE 41(e) MOTION INTERLOCUTORY AND THUS NONAPPEALABLE. THE COURT BELOW HAS DEPARTED FROM THIS LONG HELD PRECEPT

In *DiBella v. United States,* 369 U.S. 121 (1962) this Honorable Court attempted to settle the conflict among the circuits as to when an order on a Rule 41(e) motion is independent and thus appealable or but a step in the federal prosecutorial system and thus nonappealable. Mr. Justice Frankfurter, delivering the opinion of this Court, set forth this Court's findings on this matter as follows:

> [t]he mere circumstance of a pre-indictment motion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. Presentations before a United States Commissioner, *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 352-354, as well as before a grand jury, *Cobbledick v. United States,* 309 U.S. 323, are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such

> proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment — in each such case the order on a suppression motion must be treated as "but a step in the criminal case preliminary to the trial thereof." *Cogen v. United States,* 278 U.S. 221, 227. Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent. *Ibid.*; see *Carroll v. United States,* 354 U.S. 394, 404 n.17; In re *Brenner,* 6 F.2d 425 (C.A. 2d Cir. 1925).

DiBella, id., at 131, 132.

Thus, the linchpin for determining appealability in the instant context is whether there is a criminal prosecution *in esse* against the movant at the time the motion is filed.

In *Cogen v. United States,* 278 U.S. 221, 225 (1929), this Honorable Court held that an order is separate and appealable "wherever the motion is filed before there is any indictment or information against the movant, like the motions in *Perlman v. United States,* 247 U.S. 7 (1918) and *Burdeau v. McDowell,* 256 U.S. 465 (1921)."

In *Go-Bart Importing Co. v. United States,* 282 U.S. 344, 356 (1931) this Court held that:

> When the application was made, no information or indictment had been found or returned against Gowen or Bartels. There was nothing to show that any criminal proceeding would ever be instituted in that court against them. * * * It follows that the order of the district court was

> not made in or dependent upon any case or proceeding there pending and therefore the order as to them was appealable. *Cogen v. United States, supra; Perlman v. United States,* 247 U.S. 7; *Burdeau v. McDowell,* 256 U.S. 465.

In *Carroll v. United States,* 354 U.S. 394, 403-404 (1957) this Honorable Court stated:

> Earlier cases illustrated, sometimes without discussion, that under certain conditions, orders for the suppression or return of illegally seized property are appealable at once, as where the motion is made prior to indictment, * * * or perhaps where the emphasis is on the *return of property* rather than its suppression as evidence. In such cases, as appropriate, the Government as well as the moving person has been permitted to appeal from an adverse decision. (footnotes omitted)

The common thread running through all of these cases is that once the federal prosecutorial system is in train, any order granting or denying a Rule 41(e) type motion will be deemed interlocutory and thus nonappealable under 28 U.S.C. §1291. However, where the motion "is in no way tied to a criminal prosecution *in esse* against the movant" the proceeding is independent and thus appealable. The precept underlying these cases was first stated by Mr. Justice McKenna in this Court's opinion in *Perlman, supra:*

> The second contention of the government is somewhat strange, that is, that the order granted upon its solicitation was not final as to Perlman but interlocutory in a proceeding not yet brought and depending upon it to be brought. In other

> words, that Perlman was powerless to avert the mischief of the order but must accept its incidence and seek a remedy at some other time and in some other way. We are unable to concur.

Perlman, supra, at 12-13.

This precept was recently restated by this Honorable Court in *United States v. Ryan,* 402 U.S. 530, 533 (1971):

> Only in the limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims have we allowed exceptions to this principle. We have thus indicated that review is available immediately of a denial of a motion for the return of seized property, where there is no criminal prosecution pending against the movant. See *DiBella v. United States, supra,* at 131-132. Denial of review in such circumstances would mean that the government might indefinitely retain the property without any opportunity for the movant to assert on appeal his right to possession.

In the instant case there has never, ever, at any time to the date of this proceeding been any arrest, detention, presentation to a United States Commissioner, empaneling of a Grand Jury, complaint, release on bail following arrest, arraignment, information, or indictment. Clearly, unless the definition of the word "prosecution" is stretched past the breaking point, petitioners' motion is in "no way tied to a criminal prosecution *in esse* against the movant" and, accordingly, the Eleventh Circuit Court of Appeals erred in finding that it was without jurisdiction to hear the petitioners' appeal. If certiorari is not granted, then what this Honorable Court's predecessors unequivocally declared

to be unconscionable (that a person's constitutional rights can be violated without his having recourse to the federal courts) will become the law of the land!

II. A WRIT OF CERTIORARI MUST BE GRANTED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL CONSTRUING DIBELLA V. UNITED STATES

It has now been twenty-three (23) years since this Honorable Court decided *DiBella v. United States, supra.* The circuit courts of appeals are sharply split on how *DiBella, supra* is to be read. The split is both well defined and irreconcilable. A writ of certiorari should be granted to resolve this conflict and settle the state of the law once and for all in an extremely important area — the right of a person to Fourth Amendment protections versus the rights of the state.

The language in *DiBella, supra,* over which the conflict arises follows: "Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent." *DiBella, id.,* at 131-132.

The circuits are divided on the meaning of the word "solely" and on the specific question of when a criminal prosecution becomes "in being" so as to make a Rule 41(e) motion nonappealable. As to the latter question, the Eighth Circuit in *In Re Grand Jury Proceedings,* 716 F.2d 493 (8th Cir. 1983) recently reiterated its view that unless and until an actual criminal proceeding is commenced against the movant, a Rule 41(e) motion is independent and thus appealable. Accord: *Mr. Lucky Messenger Service, Inc. v. United States,* 587 F.2d 15, 16 (7th Cir. 1978) ("The motion for return of property is not one tied to a

criminal prosecution *in esse* against the movant until the criminal process shifts from the investigatory stage to the accusatory."); *Sovereign News Co. v. United States,* 690 F.2d 569, 571 (6th Cir. 1982) ("Because no indictment has been issued and no charges have been filed in any tax proceeding, the District Court's decision is a final appealable order. While we do not establish any hard and fast rule for determining when a criminal prosecution becomes 'in being' for purposes of the *DiBella* rule, we find that the mere possibility of a prosecution is too remote 'to deprive the district court's order of finality.' *United States v. Premises Known As 608 Taylor Ave.,* 584 F.2d 1297, 1301 (3d Cir. 1978).") The First and Tenth Circuits have also adopted this view. *Angel-Torres v. United States,* 712 F.2d 717 (1st Cir. 1983); *Gottone v. United States,* 345 F.2d 165 (10th Cir. 1965), *cert. denied,* 382 U.S. 901 (1965).

In conflict with these cases are decisions of the Second, Third, Fifth and Ninth Circuits. In *In Re Grand Jury Proceedings,* 604 F.2d 806 (3d Cir. 1979) the Third Circuit denied appealability after examining the "essential character" of the proceedings in the District Court. "There is obviously the possibility of a criminal prosecution against the [appellant] and it cannot be said that the motion is in no way tied to a potential indictment." *In re Grand Jury Proceedings, id.,* at 807. Accord: *Standard Drywall, Inc. v. United States,* 668 F.2d 156, 158 (2d Cir. 1982) *cert. denied,* 456 U.S. 927 (1982) ("We think the cases that have dismissed appeals by those under investigation, even in the absence of a pending criminal prosecution, have correctly applied the principles of DiBella."). See also *Simons v. United States,* 592 F.2d 251 (5th Cir. 1979) *cert. denied,* 444 U.S. 835 (1979); and *Church of Scientology v. United States,* 591 F.2d 533 (9th Cir. 1979), *cert. denied,* 444 U.S. 1043 (1980).

The question of what "solely" means in the context of "solely for the return of property" is also in conflict. This is due to the fact that while this Court stated in *DiBella, supra,* that the motion must be made solely for the return of property, this Court also stated in *Carroll, supra,* (cited with approval in *DiBella, supra,* at 132) that appealability does not depend on "whether (the motion) asks for return or suppression or both." Rather, the question is whether the motion is "an independent proceeding" and therefore appealable alone, or "merely a step in the criminal case" and therefore appealable only after final judgment or other termination of the prosecution. *Carroll, id.,* at 404 n. 17.

Furthermore, as Rule 41(e) is now written, no motion under that Rule could ever literally comply with the requirement that the motion be "solely for the return of property." This is because under the Rule any motion for the return of property is automatically treated as a suppression motion as well. In other words, the Rule itself provides for dual relief. Compare *Angel-Torres, supra,* with *Meister v. United States,* 347 F.2d 268, 269 (3d Cir. 1968).

In the instant case the Rule 41(e) motion was made while the government was merely investigating the petitioners. It has now been almost seventeen (17) months since the motion was made. The government's investigation never entered the accusatory stage. It would be exceedingly callous to accept that under these circumstances petitioners' rights can be freely violated and all petitioners' recourse as well as judicial review denied.

CONCLUSION

This case is a proper one for certiorari. The granting of certiorari will enable this Honorable Court to elucidate upon *DiBella, supra,* and for once and for all resolve the current conflict among the Circuit Courts of Appeals. Accordingly, the petition for a writ of certiorari should be granted.

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January 14, 1985

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5067

GOLDMAR, LTD., INC., PANGOLD, LTD., INC.,
Plaintiffs-Appellants,

versus

GEORGE GREELEY, JAMES J. MICHALAK,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(September 26, 1984)

Before *HATCHETT and CLARK, Circuit Judges, and STAFFORD,* District Judge.*

PER CURIAM: *The appeal in this case is dismissed for lack of jurisdiction.,*

DISMISSED.

/s/

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*Honorable William H. Stafford, Chief U.S. District Judge for the Northern District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5067

GOLDMAR, LTD., INC.
PANGOLD, LTD., INC.
Plaintiffs-Appellants,

versus

GEORGE GREELEY,
JAMES J. MICHALAK,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion *September 26,* 11 Cir., 1984, ____ F.2d ____).

(November 14, 1984)

Before HATCHETT and CLARK, Circuit Judges, and STAFFORD*, District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

*Honorable William H. Stafford, Chief U.S. District Judge for the Northern District of Florida, sitting by designation.

Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s)

UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 83-6710 CIV-JCP

GOLDMAR, LTD., INC. et al.	)
	)
Petitioners,	)
	)
vs.	)
	)
GEORGE GREELEY, et al.,	)
	)
Defendants.	)

This cause is before the Court on Petitioner's motion for return of seized items, motion for an order to show cause, application for a temporary restraining order and preliminary injunction. The Petitioner's seek the above mentioned relief on the basis of an allegedly unlawful search and seizure of business records by the Internal Revenue Service. These items were seized pursuant to search warrants issued by United States Magistrate Patricia J. Kyle. Petitioner's motions, memorandums of law and affidavits indicate these warrants were based in whole or in part upon the affidavit of Special Agent George Greeley of the Internal Revenue Service. Petitioner's note that this affidavit has been sealed and that they are therefore unaware of the contents of that document.

The Court notes there is no allegation in Petitioner's various motions that the information in the affidavit was unlawfully garnered. Nor is there any indication in the record to suggest the granting of the search warrants in this case were in any manner defective. Having considered the record in total, it is

ORDERED and ADJUDGED that

1. Petitioner's motion for return of unlawfully seized items is denied;

2. Petitioner's motion for an order to show cause is denied;

3. Petitioner's application for a temporary restraining order is denied;

4. Petitioner's motion for a preliminary injunction is denied.

DONE and ORDERED this 27th day of September, 1983 in Miami, Florida.

/s/

UNITED STATES DISTRICT JUDGE
James C. Paine

cc: Robert D. Grossman, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 83-6710 CIV-JCP

GOLDMAR, LTD., INC. et al.	)	
	)	
Petitioners,	)	
	)	
vs.	)	FINAL ORDER
	)	
GREELEY, et al.,	)	
	)	
Respondents.	)	

This cause is before the Court on Petitioner's motion for reconsideration of the Court's order (DE 8) denying return of seized property and other relief. The parties came before the Court on November 18, 1983 and argued their respective positions. Having considered the record, submissions and arguments of counsel it is

ORDERED and ADJUDGED that Petitioner's motion for reconsideration is granted. This Court's order denying relief (DE 8) is hereby vacated to the extent set forth as follows:

1. Respondent's shall deliver to Petitioner's office at Suite 201, 374 West Broward Blvd., Plantation, Florida the original documents seized on September 14, 1983 pursuant to search warrants. All such originals shall be returned except those which Respondents, in good faith, can identify as being subject to examination for authentication.

2. Those originals which are in good faith subject to examination for authentication shall be copied in a legible form, suitable for business use. Those copies shall be

delivered along with the originals not subject to authentication examination to Petitioner at the above listed address.

3. Petitioner's request, expressed in its Motion for Reconsideration, and renewed *ore tenus* at the November 18, 1983 hearing before the Court, to unseal the affidavit of Special Agent Greeley upon which the search warrant was issued, which affidavit was sealed by United States Magistrate Patricia Jean Kyle is DENIED.

4. Petitioner's motion to suppress is denied without prejudice to Petitioner's right to raise said motion to suppress at any future criminal proceeding.

5. The above listed directives shall be carried out by Respondents no later than 10 days from the date of this order.

DONE and ORDERED this 7th day of December, 1983 in West Palm Beach, Florida.

/s/

UNITED STATES DISTRICT JUDGE
JAMES C. PAINE

cc: Robert D. Grossman, Jr.
Mark Fagelson, AUSA

Office-Supreme Court, U.S.
FILED
MAY 14 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1134

In the Supreme Court of the United States

OCTOBER TERM, 1984

GOLDMAR, LTD. AND PANGOLD, LTD., PETITIONERS

v.

GEORGE GREELEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Rule:

Fed. R. Crim. P. 41(e) 1, 2, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1134

GOLDMAR, LTD. AND PANGOLD, LTD., PETITIONERS

v.

GEORGE GREELEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners challenge the court of appeals' order dismissing for lack of jurisdiction their appeal from the district court's partial denial of their Fed. R. Crim. P. 41(e) motion for return of seized property.

1. The IRS is conducting a criminal investigation of an international tax shelter scheme operated by petitioners Goldmar, Ltd., and Pangold, Ltd. (2 R. 41). Pursuant to that investigation, the IRS obtained from a United States magistrate warrants to search petitioners' business premises and to seize certain business records (Pet. 3-4). The affidavits for both warrants were placed under seal on the government's motion (Pet. App. 1b). The searches were conducted on September 14, 1983, and numerous documents were seized (*id.* at 3b).

Shortly thereafter, petitioners filed a motion under Fed. R. Crim. P. 41(e) seeking return of the seized documents. When the district court initially denied their motion (Pet. App. 1b-2b), petitioners moved for reconsideration, reiterating their request for return of the records, and also seeking (1) an order authorizing them to read and copy one of the government's sealed affidavits, and (2) an order enjoining the IRS from examining or duplicating the seized documents or from using them in any future civil or criminal investigation (1 R. 38-43, 60). The district court granted petitioners' motion for reconsideration in part. It ordered the government to return to petitioners the original copies of all documents seized, except those which the IRS could identify as "in good faith subject to examination for authentication"; it ordered the government to provide petitioners with legible copies, suitable for business use, of any originals thus retained; it denied petitioners' request to unseal the affidavit; and it denied petitioners' motion to suppress "without prejudice to [their] right to raise said motion * * * at any future criminal proceeding" (Pet. App. 3b-4b).

Petitioners appealed from the district court's order insofar as it denied their requested relief. The court of appeals, in an unpublished order, dismissed the appeal for lack of jurisdiction (Pet. App. 1a) and denied a petition for rehearing (*id.* at 2a-3a).

2. Petitioners contend (Pet. 6-12) that the court of appeals erred in dismissing their appeal for lack of jurisdiction. As they recognize (*id.* at 6-7), the denial of a Rule 41(e) motion is appealable "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant." *DiBella* v. *United States*, 369 U.S. 121, 131-132 (1962). Petitioners contend that their motion was not tied to an existing criminal prosecution because there has not yet been in this case an "arrest, detention, presentation to a United States Commissioner,

empaneling of a Grand Jury, complaint, release on bail following arrest, arraignment, information, or indictment" (Pet. 9). Petitioners assert (*id.* at 10-12) that the courts of appeals are in conflict as to when a criminal prosecution is "*in esse*" for purposes of the *DiBella* analysis and urge this Court to grant certiorari to resolve the conflict.

Whatever the merit of petitioners' argument as an abstract matter, this case does not present the question they ask the Court to review. *DiBella* sets forth a two-part test for appealability of denials of Rule 41(e) motions: the motion must not be tied to an existing criminal prosecution *and* the motion must be "solely for return of property." See, *e.g., In re Grand Jury Proceedings*, 716 F.2d 493, 495 (8th Cir. 1983). Regardless of how one interprets the former part of the *DiBella* test,[1] petitioners quite plainly failed to satisfy

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[1]As petitioners note (Pet. 10-11), some circuits seem to have interpreted the phrase "criminal prosecution *in esse*" to refer to criminal proceedings that have reached a formal accusatory stage, while other circuits have interpreted it to include earlier, investigatory stages, particularly where a grand jury has already been empanelled. Compare, *e.g., In re Grand Jury Proceedings*, 716 F.2d at 496 & n.4, with *Standard Drywall, Inc.* v. *United States*, 668 F.2d 156, 158 (2d Cir.), cert. denied, 456 U.S. 927 (1982). Whether these decisions may properly be said to conflict is unclear; this Court has regularly denied certiorari despite assertions to that effect. See *Standard Drywall, Inc.*, 456 U.S. at 927; *Simons* v. *United States*, 592 F.2d 251 (5th Cir.), cert. denied, 444 U.S. 835 (1979); *Church of Scientology* v. *United States*, 591 F.2d 533 (9th Cir. 1979), cert. denied, 444 U.S. 1043 (1980). In any event, we agree with those cases holding that investigatory proceedings may satisfy the "criminal prosecution *in esse*" part of the *DiBella* test. Appeals from denials of Rule 41(e) motions in that situation can disrupt orderly criminal proceedings and cause piecemeal review no less than appeals after an indictment has been returned. In the instant case, for example, contrary to petitioners' implication (see Pet. 9, 12), the IRS has nearly completed its investigation of the crimes alleged in the affidavits underlying the search warrants. Petitioners acknowledged below that there was "every indication of a forthcoming indictment" in this case (C.A. Br. 32), and we understand that the IRS Special Agent's report and recommendation with respect to possible indictment will be submitted to the Justice Department shortly.

the latter. Insofar as their motion was one "for return of property," it was granted. The district court ordered the government to return to petitioners the originals of all documents seized, other than those "in good faith subject to examination for authentication" (Pet. App. 3b), and to provide petitioners with legible copies of any originals thus retained. This was done almost immediately.[2] The other relief petitioners requested, which the district court denied, consisted of access to the sealed IRS affidavit, an injunction against IRS examination, duplication, or use of the records in any civil proceeding, and suppression of those records in any future criminal proceeding. But this relief had nothing to do with the return of petitioners' property. The denied portions of their Rule 41(e) motion that petitioners sought to appeal, therefore, far from being "solely for return of property" (*DiBella*, 369 U.S. at 131-132), were in fact solely for other kinds of relief. The court of appeals thus correctly dismissed their appeal for lack of jurisdiction.[3]

3. Contrary to petitioners' assertion (Pet. 12), finally, there is no uncertainty as to the meaning of the words "solely for return of property" as used in *DiBella*. This

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[2]Approximately 211 items (an "item" consisted in some cases of a single record, in other cases of a folder or box of documents) were seized from petitioners. Originals of all but 14 items were returned to petitioners at once, copies being provided of the balance.

[3]While petitioners asserted below that their business suffered harm when the records were seized (C.A. Br. 26, 29, 40), they clearly limited their claim of harm to the period during which the business was without records. Indeed, they could not have alleged that they were suffering any continuing harm on that score, since all the records seized were returned to them, either the originals or copies thereof. See *Standard Drywall, Inc.*, 668 F.2d at 157 n.2. Similarly, petitioners make no claim in this Court that they are unable to operate their business either because of the lack of records or because of the inadequacy of any of the copies they were given. Compare *In re Grand Jury Proceedings*, 716 F.2d at 495-496.

Court and the lower courts consistently have held that whether a pretrial motion is "solely for return of property" depends on its " 'essential character and the circumstances under which it is made.' " *E.g., Carroll* v. *United States,* 354 U.S. 394, 404 n.17 (1957) (quoting *Cogen* v. *United States,* 278 U.S. 221, 225 (1929)); *In re Grand Jury Proceedings,* 716 F.2d at 495 (citing cases); *In re Grand Jury Proceedings,* 604 F.2d 806, 807 (3d Cir. 1979). Although petitioners suggest (Pet. 12) that *Carroll* is at odds with *DiBella,* the latter cited the former with approval. See 369 U.S. at 132 (citing 354 U.S. at 404 n.17). And although petitioners assert that "[t]he circuits are divided on the meaning of the word 'solely' " (Pet. 10), they cite no cases to support that assertion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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